No. 87-980

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

IN THE MATTER OF B.B. AND G.B., MINORS.
MISSISSIPPI BAND OF CHOCTAW INDIANS,
Appellant,

v.

ORREY CURTISS HOLYFIELD, VIVIAN JOAN HOLYFIELD, J.B., NATURAL MOTHER AND W.J., NATURAL FATHER,
Appellees.

On Appeal From the Supreme Court of Mississippi

REPLY BRIEF OF THE APPELLANT

EDWIN R. SMITH
Box 839
Philadelphia, Mississippi 39350
(601) 656-5251

Counsel for Appellant

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PRESS OF BYRON S. ADAMS, WASHINGTON, D.C. (202) 347-8203

QUESTIONS PRESENTED

Do Mississippi Courts have jurisdiction over adoptions of Indian children whose natural parents are residents of and domiciled on an Indian Reservation?

A. Does a state court requirement of physical presence within and parental consent to children's aquisition of their parents' residence and domicile unlawfully infringe upon the special federal/tribal relationship reflected in the ICWA when applied to Indian children of reservation parents?

B. Does the definition of residence or domicile of Indian children for purposes of the Indian Child Welfare Act turn on a state or federal definition?

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SUPPLEMENTAL STATEMENT

Appellee Orrey Curtiss Holyfield died on September 15, 1988. A certificate of death is being lodged with the Clerk of the Court in documentation of this occurrence.

ARGUMENT

I. THIS COURT HAS JURISDICTION OVER 87-980 AS AN APPEAL.

Appellees seemingly confuse and mix their argument against 28 U.S.C. § 1257(2) appellate jurisdiction of this Court with their argument for state court jurisdiction over the adoptions themselves. They then skew the latter argument throughout the remainder of their brief. Nowhere do they contest 28 U.S.C. § 1257(3) review jurisdiction; seemingly acquiesing, as they should, that certiorari review in any event would lie on that basis.[1]

The gist of Appellees' argument is their claim that the issue of "the validity and the constitutionality of the Mississippi Adoption Act * * * to the adoption of twin Indian infants * * * would have had to have been raised in the lower State Court proceedings and it was not." Appellees Br. p. 6. That argument finds no support in the record of this case and fails in any

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[1] Argument I of Appellant's reply shall address only those issues of this Court's appellate jurisdiction. Those matters concerning claimed state court jurisdiction will be reserved for treatment later in this brief.

event to go to the core of this Court's appellate jurisdiction.[2]

The constitutional applicability of the Mississippi Adoption Act to this case is an ineluctable component of the tribe's challenge to the jurisdiction of state courts below. Even had it not been raised, it would nonetheless become a cognizable question for review under the "plain error" doctrine. Rule 34.1(a) provides: "At its option, however, the Court may consider a plain error not among the questions presented but evident from the record and otherwise within its jurisdiction to decide." Certainly in light of this Court's explicit ruling scarcely a decade ago on that very question in *United States v. John*, 437 U.S. 634 (1978), "plain error" would here lie.

Additionally, this Court has held that once jurisdiction has attached, "consideration of issues not present in the jurisdictional statement or petition for certiorari and not presented in the [lower court] is not beyond our power, and in appropriate circumstances we have addressed them." *Vance v. Terrazas*, 444 U.S. 252, 258-59 n. 5 (1980).

Appellant's Brief at page 16, fn. 12 does acknowledge unclarity about the precise direction and import of the Mississippi Supreme Court's holding, but this Court has previously exercised its power to determine that the federal question was necessarily decided by the state court [*Street v. New York*, 394 U.S. 576

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[2] The crux of the issue before this Court is subject matter jurisdiction of the State court below and jurisdiction is a question which may be raised at any stage of legal proceedings and may be raised by the Court *sua sponte*. *KVOS v. Associated Press*, 299 U.S. 269 (1936).

(1969)] or that the state court's refusal to deal with that question is a mere evasion of this Court's jurisdiction [See e.g., *Rogers v. Alabama*, 192 U.S. 226, 230-31 (1904) and *Wolfe v. North Carolina* 364 U.S. 177 (1960)] or created unexpectedly by decision of the highest state court. [See e.g., *Brinkerhoff-Faris Trust Co. v. Hill*, 281 U.S. 673, 677-78 (1930) and *Herndon v. Georgia*, 295 U.S. 441 (1935).]

Appellants resubmit that substantial federal questions have been properly framed, raised, presented and pursued in a timely and proper manner at all appropriate points in these proceedings. Appellants have fully met the requirements of Rules 21.1(h) and 15.1(g). This Court has jurisdiction over 87-980 as an appeal and, in any event, by certiorari.

II. MISSISSIPPI COURTS LACK JURISDICTION OVER ADOPTIONS OF INDIAN CHILDREN WHOSE NATURAL PARENTS ARE RESIDENTS OF AND DOMICILED ON AN INDIAN RESERVATION.

Appellees' argument that "25 U.S.C., Section 1913 gives State Courts jurisdiction in voluntary proceedings" (Appellees Br. pp. 6-7.) must fail because it mistakenly premises its application upon a claimed non-reservation residence and domicile status to these children of reservation natural parents. It must also fail because 25 U.S.C. § 1913(a) does not, as Appellees claim, give license for reservation resident and domiciled Indians to invoke *sua sponte* state court adoption jurisdiction in voluntary proceedings. Their claim cannot be squared with contravening sections of the

ICWA or with the governing prior decisions of this Court.[3]

Appellees' threshold concession that "[e]xclusive jurisdiction over the adoption and placement of Indian children is only conferred on the Tribal Courts under 25 U.S.C., Section 1911 which vests exclusive jurisdiction in the Indian tribe over any child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe" (Appellees Br. p. 6.) is proper. It follows that if the children are determined at law to be residents or domiciliaries of the reservation then Section 1911(a) would necessarily dictate the outcome. Having once made that concession, however, Appellees then argued inconsistently that state court jurisdiction could nonetheless be voluntarily invoked by an Indian parent under Section 1913(a). That is not the law.

25 U.S.C. § 1911(a) specifically excludes any State jurisdiction and makes the exclusion applicable to "*any* child custody proceeding involving an Indian child who resides or is domiciled within the reservation of such tribe * * * *" (Emphasis added.)

Congress having once made that enactment, Appellees cannot override federal law for their mere expedience by petitioning a state chancery court devoid of jurisdiction.

Neither 25 U.S.C. § 1913(a) nor Appellee's claimed authority of *Desjarleit v. Desjarleit*, 379 N.W.2d 139

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[3] Appellant's argument of this section shall address only the latter postulate; however the discussion of the residence and domicile issue under Argument III, infra, is incorporated by reference here as well.

(Minn. App. 1985); *In Re: Bertleson*, 617 P.2d 121, 125 (Mont. 1980); *In the Matter of S.Z., S.D.*, 325 N.W.2d 53 (S.D. 1982); or *In the Matter of Duryea*, 115 Ariz. 86, 583 P.2d 885 (1977) can serve to override the clear language and import of Section 1911(a).

Appellees seemingly misunderstand that *Desjarleit* and *Bertleson, supra.* are both custody cases following state divorce awards and that 25 U.S.C. § 1903(1) specifically exempts "an award, in a divorce proceeding, of custody to one of the parents" from ICWA coverage, jurisdiction and protection provisions.

Neither is *Matter of S.Z., S.D., supra*, of precedental value. Involved there were neglect proceedings for which Section 1911(b) expressly provides concurrent state jurisdiction subject to tribal court transfers. 1911(a) was never at issue in that case.

In the Matter of Duryea, supra, is of no authoritative value since it predates the passage of the ICWA and is now legislatively overturned. An unbroken string of post-ICWA Arizona cases now hold to the contrary of *Duryea. See*, e.g. *Matter of Appeal in Pima County Juvenile Action No. S-903*, 130 Ariz. 202, 635 P.2d 187 (Ariz. App. 1981); *Goclanney v. Desrochers*, 135 Ariz. 240, 660 P.2d 491 (Ariz. App. 1982); *Matter of Appeal in Maricopa County Juvenile Action No. A2*, 136 Ariz. 528, 667 P.2d 228 (Ariz. App. 1983); and *Matter of Appeal in Coconino County Juvenile Action No. J-10175*, 153 Ariz. 346, 736 P.2d 829 (Ariz. App. 1987).

Section 1913 could only be read in isolation to infer any basis for voluntary invocation of state adoption jurisdiction by reservation Indian parents and that

inference would be at clear odds with the stated purposes of the ICWA. This Court's precepts of statutory construction clearly preclude that approach. "[In] all cases of statutory construction, [the Court's] task is to interpret the words of the statute in light of the purposes Congress sought to serve." *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, at 118. (1983). The United States Supreme Court, when engaged in the construction of a federal statute, cannot impute to Congress a purpose to paralyze with one hand what it sought to promote with the other. *United States v. Raddatz*, 447 U.S. 667 (1980).

Throughout their argument Appellees continue to ignore this Court's fundamental holding of exclusive tribal jurisdiction over reservation Indians' domestic relations in *Fisher v. District Court*, 424 U.S. 382 (1976). They also ignore this Court's observation therein that "even if a jurisdictional holding occasionally results in denying an Indian plaintiff a forum to which a non-Indian has access, disparate treatment of the Indian is justified because it is intended to benefit the class of which he is a member by furthering the congressional policy of Indian self-government." 424 U.S. 390-391. Mississippi courts lack adoption jurisdiction over Indian children of reservation resident and domiciled parents and Appellees' insistence upon invoking a non-extant jurisdiction despite contravening federal law and guiding decisions of this Court cannot be justified by Appellees' expediencies.

III. MISSISSIPPI COURTS' REQUIREMENTS OF PHYSICAL PRESENCE WITHIN AND PARENTAL CONSENT TO CHILDREN'S ACQUISITION OF THEIR PARENTS' RESIDENCE AND DOMICILE UNLAWFULLY INFRINGES UPON THE SPECIAL FEDERAL/TRIBAL RELATIONSHIP WHEN APPLIED TO INDIAN CHILDREN OF RESERVATION PARENTS.

Appellees' mischaracterization, and perhaps misunderstanding, of the true import of the case of *Matter of Adoption of Halloway*, 732 P.2d 962 (Utah 1986) should not be misleading to this Court. Neither should Appellees' unfounded assurances "that the final arbitrator [sic] of the definition of domicile in the State of Mississippi is the Mississippi Supreme Court." Appellees Br. p. 11. Rather, the true significance of the Utah Supreme Court's decision in *Halloway*, of course, is that it demonstrates a proper deference to preemptive federal law whenever the application of contravening state definitions would otherwise frustrate the purposes of federal statutes. Reinforcing Appellant's reliance upon the cases *American Railway Express Co. v. Levee*, 263 U.S. 19 (1923) and *Dice v. Akron, Canton & Youngstown R.R. Co.*, 342 U.S. 359 (1959) as authority for this proposition, is this Court's most recent ruling in *Felder v. Casey*, ___ U.S. ___, 101 L.Ed.2d 123 (1988). On a much closer question impacting heavily on legitimate state interests and principles of federalism, this Court nonetheless held that Wisconsin's notice-of-claim statute was pre-empted pursuant to the Supremacy Clause when § 1983 actions are brought in that state's courts. This Court instructed:

> Under the Supremacy Clause of the Federal Constitution, "[t]he relative importance to the State of its own law is not material when

> there is a conflict with a valid federal law," for "any state law, however clearly within a State's acknowledged power, which interferes with or is contrary to federal law, must yield. *Free v. Bland*, 369 U.S. 663, 666 (1962). 101 L.Ed.2d at 138.

Both the majority and the dissenting opinion in *Felder* noted that there were important purposes underlying the notice-of-claim statute. The basis of departure between the majority and the dissent in *Felder* was the importance of pre-emption on balance with competing principles of federalism.

There are, however, no similar considerations in this instant case. Mississippi's affixing of physical presence and parental intent requirements to children's acquisition *at law* of their natural parents' residence and domicile at the time of birth can only be deemed a situation specific result oriented requirement. It is virtually impossible to conjure legal situations other than adoption actions where these particular elements would otherwise transect. Furthermore, it appears that the only operative effect Mississippi's dual requirements could ever have would be to defeat this federal ICWA. Since the Indian Child Welfare Act is unique in its being the only federal law that delimits a mother's right on the basis of residency or domicile to voluntarily invoke a state court's adoption jurisdiction, application of these additional standards discriminatorily impacts only Indian tribes, Indian parents and Indian children.

Appellees would also leave the impression in their argument of this section that in *Stubbs v. Stubbs*, 211 So.2d 821 (Miss. 1968) "the Mississippi Supreme Court

gave its criteria and rationale in the case at bar." [Appellees Br. p. 11.] Their characterization cannot be squared with a full reading of that case, for the Mississippi Supreme Court opinion begins its legal analysis in the following manner:

> Quite clearly the domicile established by the mother and father of the decedent in Natchez, Mississippi, in 1955 became the domicile of the minor child. *Boyle v. Griffin*, 84 Miss. 41, 36 So. 141 (1904). This domicile of origin continues until another is acquired. *Lucia v. Lucia*, 200 Miss. 520, 27 So.2d 774 (1946), and *Smith v. Deere*, 195 Miss. 502, 16 So.2d 33 (1943).
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> 211 So.2d at 824.

This again illustrates that the decision on domicile by the court below was an avulsive break with the past approach of the Mississippi Supreme Court and a distinct deparation from generally accepted principles of domicile. This approach must not be allowed to defeat Federal intent in enacting the Indian Child Welfare Act.

IV. THE DEFINITION OF RESIDENCE OR DOMICILE OF INDIAN CHILDREN FOR PURPOSES OF THE INDIAN CHILD WELFARE ACT TURNS ON A FEDERAL RATHER THAN A STATE DEFINITION.

Appellees Argument of this section seems to build initially upon the flawed premise that "[t]here is no Federal definition of domicile" (Appellee's Br. p. 14) and none in the ICWA; therefore, their argument goes, Bureau of Indian Affairs' guidelines for implementing the Act borrowed existing state law defini-

tions. Appellees then erroneously argue that for this Court to overturn such a state definition would be unprecedented. Distinguishing this case on its claimed unique configuration of facts from the authorities (and seemingly the arguments) cited in Appellant's Argument Number Four, Appellees renew their belief that Section 1913 enables this state court adoption and does so without notice to the tribe.[4]

The ICWA authorizes the Secretary of Interior to promulgate "such rules and regulations as may be necessary to carry out the provisions" of the Act. 25 U.S.C. § 1952. Acting through the BIA, the Secretary has promulgated numerous mandatory rules and regulations. In addition to these mandatory rules and regulations, Interior has also published recommended procedures or guidelines (hereinafter "guidelines") for state courts involved in Indian child custody proceedings. These "guidelines" are not binding and simply represent what the BIA believed at the time of enacting them was required to assure that the rights guaranteed in the ICWA were protected whenever state courts decided custody matters.[5]

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[4] Appellee, in response, continues to maintain that claims of factual distinctions or claims as to the uniqueness of these particular case facts cannot defeat the law of the case. The Section 1913 argument and the contention against this Court's overturning "any known State law by a State Supreme Court" (Appellee's Br. p. 14) being addressed elsewhere in this Brief, the remainder of this argument shall address the BIA implementation guidelines and the Federal definition of domicile issues.

[5] The United States' position on the ICWA is on record with this Court by virtue of its filing at the invitation of this Court as Amicus Curiae in *Pino v. District Court of the Second Judicial District's Children's Court, etc.*, No. 84-240. A copy of that filing has been lodged in this case with the Clerk of the Court.

This Court has held in *Morton v. Ruiz*, 415 U.S. 199 (1974) that Bureau of Indian Affairs regulations of its internal manual could not narrow or defeat entitlements otherwise provided by statute. It follows, *a fortiorari*, that a mere guideline, lacking even the purpose or force of a duly APA promulgated regulation, must give way in the face of the overriding ICWA's policy and provisions.

Another flaw to Appellees' guideline argument is that it overlooks the state of residency and domicile rules—including those espoused by Mississippi's courts—extant at the time of the guidelines' November, 1979 promulgation. Therefore, when the BIA Introductory comments to the guidelines determined unnecessary the inclusion of definitions of domicile because "these terms are well-defined under existing State law" and said "[t]here is no indication that these State law definitions tend to undermine, in any way, the purposes of the act" (Guidelines, 44 Fed.Reg. at 67,5 ___ (November 26, 1979) there was no conflict. To now extend that pronouncement to bind the Bureau's endorsement to all subsequent changings of state residency and domicile rules would be unconscionable.

At the time the guidelines were promulgated, American jurisdictions uniformly followed the rule that an illegitimate child takes the domicile of its mother. Restatement (Second) of Conflict of Laws §§ 14, 22 comment c (1971); Restatement of Conflict of Laws § 34 (1934).

Mississippi, itself, had scarcely three years before in *In Re Guardianship of Watson*, 317 So.2d 30 (Miss. 1975) explicitly stated: "The law is unchallenged that the residence of a minor is that of his parents and

remains so during the period of minority in spite of the temporary absence at school or elsewhere." Id, at 32.

Appellee cannot now bootstrap state court jurisdiction *ipso facto* by these rulings in this present case below.

Appellant disagrees, too, with Appellees' claim that "[t]here is no Federal definition of domicile." Appellees' Br. p. 14. Appellees seemingly misunderstand that federal enactments utilizing terms without expressly defining the words used need neither refer nor defer to state courts for final definition. Appellees seemingly disregard the fact that federal courts make routine threshold determinations of 28 U.S.C. § 1332 diversity jurisdiction by federal standards and definitions of domicile which at times are at variance with state standards

Appellants resubmit that their arguments and authorities of Part IV of their initial Brief on the Merits manifestly evince a congressional intent that the definition of residence or domicile of Indian Children for purposes of the Indian Child Welfare Act turn on a federal rather than a state definition.

Application of this Court's rules of statutory construction to this case also leads inescapably to the conclusion that a federal definition of residence and domicile was intended by Congress. The meaning of federal statutory language is normally "a question of federal, not state law." *Dickerson v. New Banner Institute, Inc., supra.* "In the absence of a plain indication to the contrary, * * * it is to be assumed when congress enacts a statute it does not intend to make its application dependent on state law." *Id.* at 119.

Quoting *NLRB V. Randolph Electric Membership Corp.* 343 F2d 60, 62-63 (CA4 1965).[6] This is because the application of federal legislation is nationwide and at times the federal purpose would be defeated if state law were to control. *Dickerson, supra.* at 119-120. Citing *Jerome v. United States*, 318 U.S. 101, 104 (1943).

In determining the scope of a federal statute, one is to look first at its language. *Dickerson v. New Banner Institute, Inc.*, 460 U.S. 103, 110 (1983). If the language is unambiguous, ordinarily it is to be regarded as conclusive unless there is a clearly expressed legislative intent to the contrary. *United States v. Turkette*, 452 U.S. 576, 580 (1981). Any doubts or ambiguities, should they exist, are to be resolved in favor of the Indians. *Bryan v. Itasca County*, 426 U.S. 373, 392-393 (1976). *United States v. Kagama*, 118 U.S. 375, 384 (1886).

Appellants position constitutes the best practicable means for enforcing and carrying out the full provisions of the ICWA and the most reasonable means for judicial administration. By contrast, Appellees would foist a standard difficult to ascertain within ostensible *ex parte* adoptions of, too often, culturally reticent Indian parents' children. Balkanizations would be effected upon multi-state reservations and the standard of "intent" would control the destiny of infant children themselves incapable of entertaining, or

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[6] 25 U.S.C. § 1903(6)—the definitions portion of the act—does make specific reference to "state law" in defining Indian custodians. Circumstances considered, it would follow consistently that if Congress had in fact intended to define domicile according to state law it would have likewise so provided in Section 1903.

at least articulating intent if the ruling below were upheld.

In the alternative, if this Court accepts the theory that state law definitions of domicile are applicable, the Court must carve out an exception where state law definitions lead to a result which conflicts with federal legislative intent. Under either theory, the court below must be reversed.

CONCLUSION

Throughout, Appellant has refrained from responding to the repeated representations of claimed fact on matters that are not supported by the record—including the insertions of hearsay testimonials on the part of opposing counsel—and notwithstanding that much seemingly constitutes "burdensome, irrelevant, immaterial, and *scandalous* matter." Rule 34.6. (Emphasis added.) In addition, their factual distinctions are legally meaningless.[7] Appellant's silence in the face of these representations should not be construed as any acquiesence in the claimed truth of these matters but instead it constitutes deference to the rule of law.

It is on the basis of that law that this decision should be reversed and the case remanded with instructions to dismiss for lack of jurisdiction and to transfer the matter to tribal court.

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[7] The claim of one-quarter Choctaw lineage on the part of Orrey Curtiss Holyfield, even if established, would not have altered the situation. The 1975 Revised Constitution and By-Laws of the Mississippi Band of Choctaw Indians requires one-half or more Choctaw blood for membership. [Copy of the tribal constitution is lodged with the Court.]

Respectfully submitted,

EDWIN R. SMITH
Box 839
Philadelphia, Mississippi 39350
Telephone: 601/656-5251

Counsel for Appellant
Mississippi Band of Choctaw Indians

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